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# In the Supreme Court of the United States

OCTOBER TERM, 1945

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No. 549

EDWARD F. MCGUNNIGAL, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE FIRST  
CIRCUIT*

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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**OPINION BELOW**

The opinion of the circuit court of appeals (R. 67-74) is not yet reported.

## **JURISDICTION**

The judgment of the circuit court of appeals was entered on September 17, 1945 (R. 75). The petition for a writ of certiorari was filed on October 22, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Crimi-

nal Appeals Rules promulgated by this Court on May 7, 1934.

#### QUESTIONS PRESENTED

1. Whether an agreement by workers to pad the pay roll of a government contractor who will innocently present a claim to the United States for reimbursement of the false wages paid, constitutes a conspiracy to defraud the United States by causing false claims to be presented to it.

2. Whether, under the trial judge's instructions, the jury was allowed to return a verdict of guilty based upon conjecture as to a matter of public knowledge.

3. Whether a conspiracy which, to the knowledge of the defendants, has as its natural and probable consequences a fraud upon the United States, constitutes a conspiracy to defraud the United States.

#### STATUTES INVOLVED

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

Section 35 (A) of the Criminal Code (18 U. S. C. 80) provides in part:

Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; \* \* \* shall be fined not more than \$10,000 or imprisoned not more than ten years, or both.

#### STATEMENT

A conspiracy indictment (R. 1-7) returned against petitioners and others in the United States District Court for the District of Massachusetts alleged that the Bethlehem-Hingham Shipyard, Inc., was constructing numerous escort vessels for the United States under two contracts with the Navy Department, which provided that the Shipyard should be reimbursed for the cost of constructing the vessels. The petitioners Batista, Biganzoli, Paris, Testa, Welch and Zani and other defendants who did not stand trial or did not appeal from their convictions (see R. 2-4, 45) were described as welders employed by the Shipyard

who were paid for the hours of work actually performed by them and for "bonus hours" which they might earn under a work-incentive plan in force at the Shipyard. The "bonus hours" were described as half the number of hours saved by the welder by reason of having accomplished more work in a certain period than was expected under certain work schedules. (R. 3-4.)

Petitioner Edward F. McGunnigal, Jr., and the defendant George W. Bodenschatz allegedly were employed by the Shipyard as "counters" to count and measure the amount of work performed by the welders and to record the correct amounts of work done by each welder on a daily tally sheet, which was thereafter transmitted to the accounting department of the Shipyard. It was alleged that the daily tally sheets were used by the accounting department to compute the number of "bonus hours" earned by each welder and his weekly wages, and the payroll charges for work done under the contract. The payroll charges were alleged to have been submitted by the Shipyard to the Navy Department periodically as parts of claims by the Shipyard for the reimbursement of the cost of performing the contracts. (R. 4.)

The indictment then charged that petitioners and the other defendants conspired to defraud the United States by agreeing that the counters, McGunnigal and Bodenschatz, in return for certain money paid to them by the welders, would make

out false daily tally sheets showing that the welders had performed more work than they had actually accomplished and that the false tally sheets would be forwarded by the counters to the accounting division of the Shipyard. It was alleged that it was the purpose of the conspirators that the welders would be given credit and paid for bonus hours which they had not earned. Finally, it was charged that petitioners "well knew that the said Shipyard would be reimbursed by the Navy Department for the cost of work done in connection with the manufacture and construction of the aforesaid ships, and that the excess and fraudulent amounts of payroll payments which they would receive each payroll period would be charged and billed to the said Navy Department by the Shipyard and that said Navy Department would pay and reimburse the Shipyard for said false, fraudulent and excess payroll payments out of the funds of the United States of America." (R. 5-6.)

The defendant Bodenschatz, who testified on behalf of the Government, stated that he worked as a counter with petitioner McGunnigal on hulls 3080, 3081, and 3097 and that jointly they ran a "club" on each of these vessels (R. 18-19, 20-21). The remaining petitioners and other welder defendants were members of one or more of these "clubs" and paid \$5.00 a week, except for petitioner Testa and defendant Scalzi who paid \$2.50 (R. 19, 21). The witness defined a "club" as

consisting of "people on the boat [who] were paying \$5 a week to McGunnigal for three hours or three and a half more bonus hours than they were actually entitled to" (R. 19). The welder petitioners were credited with about three extra bonus hours per day in return for the money which they paid (R. 19, 21). Both McGunnigal and Bodenschatz collected payments from the welders the day after pay day (R. 20) and split the collections between them either inside or outside the head houses (R. 20, 25). One of the means by which the welders were given extra bonus hours was to credit them with extra footage of welding on the daily tally sheets (R. 25-26).

Three of the welder defendants who had pleaded guilty, testified on behalf of the Government that they had worked on one of the hulls on which Bodenschatz and McGunnigal were counters and that they had paid money to both with the understanding that they would be given extra bonus hours (R. 31-33).

It was shown that the daily tally sheets were made out and given to the supervisors of the piecework counters, who sent them to the piecework office (R. 27), where the rates for welding were entered and multiplied by the quantity of work shown, the allowed hours put down, and the premium rate and percentage of efficiency recorded (R. 28). The tallies were then sent to the payroll department, which computed the welders' total earnings for each day, including pre-



mium pay, from time cards and the daily tally sheets (R. 28). The payrolls were totaled each week and entered on a payroll sheet, and the cost figures reflected therein were determined and forwarded to the main office of the accounting department (R. 28).

The Government also introduced in evidence vouchers and supporting accounting which had been rendered by the Shipyard to the United States Government (R. 29). These vouchers included expenses for labor incurred on hulls 3080, 3081, and 3097, and were identified as the reimbursing vouchers covering all the paid or payable costs which were billed to the Government (R. 29-30).

The Naval Cost Inspector testified that he received the original vouchers from the accounting department of the Shipyard, and that they were signed by himself and the Technical Inspector and were immediately presented for payment to the Disbursing Office in Boston (R. 30).

Two agents of the Federal Bureau of Investigation testified as to written statements received from petitioners. The first paragraph of each statement was as follows:

I have been employed at Bethlehem-Hingham Shipyard, Hingham, Mass., since about \* \* \*, and since \* \* \* I have known that this shipyard is engaged 100% in building ships for the United States Government. (R. 30-31.)

Upon cross-examination each petitioner admitted knowing that he was working on destroyer-escort vessels which would be used in naval warfare and that those vessels were being built for the United States Government. All except petitioner Welch (R. 36) admitted knowing that the United States Government would pay for the vessels on which they were working. (R. 34-43.)

Petitioner McGunnigal received a sentence of six months' imprisonment (R. 10) and the remaining petitioners were sentenced to imprisonment for two months (R. 9-10, 11, 13-16). Execution of the sentences was stayed pending appeal (R. 16-17), and the convictions were affirmed by the Circuit Court of Appeals for the First Circuit (R. 75).

#### ARGUMENT

Petitioners' argument (Pet. 7-8, 9-13) that the so-called false claims statute (Sec. 35 (A) of the Criminal Code, 18 U. S. C. 80, *supra*, p. 3) does not extend to a corporation other than one which is both an instrumentality of the United States and in which the United States is also a stockholder, is not applicable to the facts of this case. The argument is pitched upon the premise that the submission of a padded tally sheet to a government contractor is not the presentation of a claim to the United States or a corporation in which the United States is a stockholder and, hence, is not a violation of the false claims statute.

This completely ignores the fact that this case arises under a statute involving causation, and accordingly the criminal responsibility is based not upon the acts of padding the payroll in themselves but upon the ultimate result known to flow from those acts. The false claim which fastens criminal responsibility upon petitioners is not the padded tally sheet, but the voucher and claim presented by the Shipyard to the Navy Department requesting reimbursement of wages paid by the Shipyard in constructing the warships. It is evident that the presentation of the false claim by the Shipyard was the natural and probable result of the turning in of padded tally sheets by petitioners and was thus "caused" by them within the interdiction of the false claims statute. The tally sheets were used to calculate the wages due the welders, and the wages were entered upon a payroll which was used in computing the labor costs for which the Shipyard claimed reimbursement in vouchers presented to the Naval Cost Inspector. The district court made this distinction clear to the jury, stating that the claims against the United States referred to by counsel for the defendants in his arguments were the vouchers submitted by the Shipyard and not the tally sheets, "So that the only other element that you have to concern yourselves with is whether or not these men caused these claims to be presented knowing that they were false" (R. 52). This Court has held that one may violate the false

claims statute by causing others to present a false claim to a government department (*United States ex rel. Marcus v. Hess*, 317 U. S. 537, 542-545) and it has been held that one knowingly causing others to make false statements in matters within the jurisdiction of a government department or agency is criminally responsible under the second clause of the statute.<sup>1</sup> *United States v. Goldsmith*, 108 F. 2d 917, 920 (C. C. A. 2), certiorari denied, 309 U. S. 678;<sup>2</sup> see also *United States v. Giles*, 300 U. S. 41.

2. Petitioners also contend, without supporting argument, that a jury in a criminal case should not be permitted to infer a specific personal knowledge from an assumption of a "general knowledge" of a "fact" not based upon evi-

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<sup>1</sup> The second clause of the statute covers those who "knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, or make or cause to be made any false or fraudulent statements or representations, or make or use or cause to be made or used any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder \* \* \*." (18 U. S. C. 80).

<sup>2</sup> *Lowe v. United States*, 141 F. 2d 1005 (C. C. A. 5), is not to the contrary since in that case the indictment charged only that the false representation was made to an employee of the cost plus contractor and did not allege that such act caused any further false representation by the contractor to any government department or agency.

dence and of which the court itself could not take judicial knowledge (Pet. 9, 13). Evidently the contention is made in relation to the statement in the circuit court of appeals' opinion (R. 73) that "it being well known generally that the 'cost plus' type of contract was widely used by the Government during the late war, we think it might logically be inferred that [petitioners] in fact knew, or at least had reason strongly to suspect that the payrolls which they conspired to pad would ultimately be paid by the United States Government" (see Pet. 2).

However, the case was submitted to the jury upon the express instruction that "the burden is upon the Government to prove beyond a reasonable doubt that the defendant[s] had knowledge that the shipyard would present to the United States Government a claim for reimbursement for money paid to the defendant[s]" (R. 48). Later in his charge, the trial judge told the jury that in order to convict they must find that the defendants' plan was to cause false claims to be presented to or against the United States, but that knowledge that the claims would be paid by the United States could be inferred from the facts, circumstances, and conditions proved at the trial (R. 50-51). In elaborating this instruction, the judge stated that the jury could consider the type of contract between the United States and the Shipyard—whether it was a private and secret document or a public one to which all parties had

access—that “It may well be that there is general knowledge as to just how the Government has these ships built,” but that if the contract was a closely guarded one which only the Government and the Shipyard ever saw, the “suggestion of public knowledge could not be entertained.” The judge then went on to say that the jury should consider the circumstances under which the defendants were employed and the daily tally sheets were handled, together with the “statements that have been made” (see p. 7, *supra*), and he concluded this portion of his charge by saying that “those circumstances might justify you in believing that the Government has established the burden that they [the defendants] knew that these claims would eventually be presented to the United States Government and that their presentation might result in the Government being defrauded.” (R. 51.) In addition, earlier in his charge, the judge had stated that the jury should confine their deliberations to the evidence that they had heard in the case (R. 45); that the case against each defendant must be considered “on the facts as they have been developed here” (R. 46); and that the burden was on the Government “to establish every essential element of the crime charged beyond a reasonable doubt,” the term reasonable doubt being clearly explained (R. 47).

It is clear from the foregoing summary of the pertinent portions of the charge that the jury must have understood that a finding that peti-

tioners possessed knowledge that the Shipyard would present claims to the United States Government for reimbursement of their padded wages could not be based upon the conjecture that petitioners, as members of the public, had a general knowledge as to the type of contract under which the Government had the ships built. Having been repeatedly cautioned that they must consider only the evidence in the case and that in order to convict they must find beyond a reasonable doubt that petitioners knew that the padded wages would result in a false claim therefor being presented to the Government by the Shipyard, it seems obvious that the jury's verdict in this respect was not based upon any assumption of general knowledge that the ships were being built under cost-plus contracts, but was based upon all the evidence and circumstances adduced to show the existence of the required knowledge on their part.

The record supports the holding of the circuit court of appeals (R. 72-73) that there was sufficient evidence to enable the jury to infer that petitioners knew the pay rolls they conspired to pad would ultimately be paid by the United States<sup>2</sup> and under the circumstances, the sentence

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<sup>2</sup> The circuit court of appeals stated (R. 72) :

\* \* \* we find evidence from which the jury could properly infer that the appellants knew that the fictitious labor charges would be reflected in higher costs to the Government and thus that the Government would ultimately be the victim of their fraud.

in the circuit court of appeals' opinion upon which petitioners rely (*supra*, p. 11) must be taken to express a view that the verdict was not unreasonable in the light of the general knowledge which the public possesses as to the Government's wide use of the "cost-plus" type of contract in connection with the acquisition of war matériel.

3. Finally, petitioners assert, again without supporting argument, that where the direct object of an unlawful agreement is fraud upon a private corporation, there is not a criminal conspiracy, even though as a probable consequence of the agreement the United States may suffer (Pet. 9, 14). This contention is rested solely upon a statement in *United States v. Peoni*, 100 F. 2d 401, 402 (C. C. A. 2), that the rule of criminal liability for the natural consequences of one's act is not the same as that applied in civil cases. That statement has no application here, where petitioners were convicted upon the finding that they knew the United States would be the ultimate victim of the fraud, whereas in the *Peoni* case there was no evidence showing that Peoni, who was the original possessor and seller of counterfeit notes, knew that the notes would ultimately find their way into the possession of the co-defendant Dorsey, a retailer and resident in another federal district. While it may be true that petitioners' immediate purpose and object were to



mulet their employer out of wages to which they were not entitled, they sought to achieve their ends by the fraudulent means of submitting false claims for wages knowing, as the jury found, that the Shipyard would present those claims to the United States for reimbursement. And even if petitioners and their co-conspirators had some immediate objective different from causing false claims to be presented to the United States, that fact would not relieve them from criminal responsibility. *Williams v. United States*, 295 Fed. 302, 304-405 (C. C. A. 5), certiorari denied, 265 U. S. 591; see also *United States v. Anderson*, 101 F. 2d 325 (C. C. A. 7), certiorari denied, 307 U. S. 625. Accordingly, petitioners' contention is of no avail since, as the jury found, they knew the ultimate consequences of their corrupt agreement.

#### CONCLUSION

The decision below is correct and the case presents no real conflict of decisions or question of substantial importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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NOVEMBER 1945.